

¹ 5 U.S.C. § 8101 *et seq.*

she refused an offer of suitable work.² On July 26, 2002 the Board reversed OWCP's termination of her compensation based on its finding that she had no further employment-related disability.³ In a decision dated June 21, 2005, the Board affirmed in part and set aside in part a July 13, 2004 decision finding that appellant received an overpayment of compensation and denying waiver of recovery of the overpayment.⁴ The Board determined that OWCP had incorrectly offset a portion of the overpayment created due to a failure to properly deduct life insurance premiums. The Board remanded the case for recalculation of the overpayment but affirmed the denial of waiver of the recovery of the overpayment. The facts and circumstances as set forth in the prior decisions are hereby incorporated by reference.

By decision dated November 29, 2006, OWCP terminated appellant's compensation effective November 29, 2006 after finding that she refused an offer of suitable work under 5 U.S.C. § 8106(c). In a decision dated March 20, 2007, an OWCP hearing representative reversed the November 29, 2006 termination decision. She remanded the case for OWCP to refer appellant for a second opinion examination to determine whether she had residuals of her accepted employment injury. The hearing representative further noted that it appeared OWCP had accepted right lower traumatic arthropathy as employment related and instructed OWCP to have the referral physician clarify the exact right lower extremity condition.

In a report dated July 26, 2007, Dr. James F. Bethea, a Board-certified orthopedic surgeon and OWCP referral physician, diagnosed status post total right knee replacement and left knee osteoarthritis after three arthroscopies. He stated, "[Appellant] does have ongoing residuals in her left knee because of the degenerative arthritis there. The residual at the right knee, apparently required a total knee replacement done about a year ago." In an August 7, 2007 supplemental report, Dr. Bethea advised that appellant's "right lower traumatic arthropathy condition is resolved because about a year ago she underwent a right total knee replacement."

Based on Dr. Bethea's opinion, OWCP expanded acceptance of the claim to include left knee osteoarthritis.

On June 11, 2010 OWCP referred appellant to Dr. Robert M. Moore, a Board-certified orthopedic surgeon, for a second opinion examination regarding the extent of an impairment of the bilateral knees. In a report dated August 5, 2010, Dr. Moore indicated that appellant had accepted work injuries of the bilateral knees. He discussed her complaints of right and left knee pain and listed findings on examination. Dr. Moore reviewed x-rays showing advanced osteoarthritis of the left knee "with complete loss of medial joint cartilage space and extensive osteophyte formation" and x-rays of the right knee showing a total knee arthroplasty. He diagnosed advanced osteoarthritis of the left knee and status post right knee arthroplasty due to

² Docket No. 04-2056 (issued June 21, 2005). OWCP accepted that appellant, then a 34-year-old letter carrier, sustained left knee sprain, a tear of the left posterior horn meniscus, a left medial meniscal tear and localized primary osteoarthritis of the left knee on December 2, 1992 in the performance of duty. She stopped work on December 3, 1992 and did not return.

³ Docket No. 02-159 (issued July 26, 2002); *petition for recon. denied*, Docket No. 02-159 (issued January 10, 2003).

⁴ Docket No. 04-2056 (issued June 21, 2005).

osteoarthritis. For the left knee, Dr. Moore identified the diagnosis as class 4 arthritis according to the knee regional grid set forth at Table 16-3 on page 511 of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (6th ed. 2009) (A.M.A., *Guides*), which yielded a default value of 50 percent. He applied grade modifiers of 3 for functional history, 2 for physical examination and 4 for clinical studies, to find a total left lower extremity impairment of 50 percent. For the right knee, Dr. Moore identified the diagnosis as a class 3 total knee replacement according to Table 16-3 on page 511 of the knee regional grid, for a default value of 37 percent. He applied grade modifiers of 2 for functional history and physical examination and 1 for clinical studies, to find a final right lower extremity impairment of 31 percent.

In a report dated August 11, 2010, an OWCP medical adviser related that Dr. Moore provided “a clear and objective review of the knee problems” but found that his impairment rating was not sufficiently explained. In accompanying impairment worksheets, he applied the net adjustment formula to Dr. Moore’s findings and determined that appellant had a 50 percent left lower extremity impairment and 31 percent right lower extremity impairment.

By decision dated March 17, 2011, OWCP granted appellant a schedule award for a 50 percent permanent impairment of the left lower extremity and a 31 percent permanent impairment of the right lower extremity. The period of the award ran for 233.28 weeks from February 13, 2011 to August 3, 2015.

On April 15, 2011 appellant requested a review of the written record by an OWCP hearing representative. Following a preliminary review of the record, in a decision dated June 27, 2011, OWCP’s hearing representative set aside the March 17, 2011 decision. She noted that in referring appellant to Dr. Bethea OWCP did not specify what portion of the right leg the accepted condition of arthropathy was referring to. The hearing representative noted that OWCP’s medical adviser found Dr. Moore’s grade modifiers insufficiently explained. She further found that OWCP had not specifically determined whether appellant’s right knee condition or right knee placement surgeries were causally related to her December 3, 1992 work injury. The hearing representative remanded the case to OWCP to consider whether appellant “has submitted sufficient medical evidence to support her right knee condition is related to the December 3, 1992 work injury either by direct cause or as a consequence of the left knee injury with subsequent surgeries.” After this determination, she instructed OWCP to prepare an updated statement of accepted facts and ask Dr. Moore to explain finding of grade modifiers.

OWCP prepared a March 16, 2012 statement of accepted facts listing the accepted conditions as a left knee sprain, a tear of the left knee posterior horn meniscus and left knee localized primary osteoarthritis. It indicated that it had not accepted that she sustained a right knee medial meniscus tear or the right knee arthroplasty in 2006 and revision in 2010 as work related.

On April 4, 2012 OWCP referred appellant to Dr. Dowse D. Rustin, a Board-certified orthopedic surgeon, for a second opinion regarding whether appellant sustained traumatic arthropathy of the right lower leg due to her work injury and, if so, to specify the part of the lower leg. It further requested an opinion on whether she had residuals of her accepted work injury. In a report dated April 12, 2012, Dr. Rustin advised that appellant sustained right lower

extremity arthropathy of the knee as a consequence of her December 3, 1992 work injury. He further found that she had continued disability as a result of her work injury. In a supplemental report dated May 16, 2012, Dr. Rustin opined that appellant sustained a bilateral ankle condition due to weight gain.

On May 10, 2012 OWCP expanded acceptance of appellant's claim to include right knee arthropathy.

In a letter dated November 18, 2012, appellant requested expansion of her claim to include left ankle, hip and hand conditions and a schedule award for her right ankle. By letter dated December 17, 2012, OWCP informed her that the medical evidence did not establish that she had a greater impairment than that awarded by decision dated March 17, 2011. On December 17, 2012 appellant requested a review of the written record on the December 17, 2012 letter. On February 1, 2013 OWCP advised her that as the December 17, 2012 letter was not a final decision, she could not receive a review of the written record based on the correspondence.

On April 12, 2013 an OWCP medical adviser reviewed the record and found no evidence supporting a "revision of the impairment rating."

By letter dated April 26, 2013, OWCP referred appellant to Dr. Moore for an impairment evaluation. In a report dated May 23, 2013, Dr. Moore diagnosed advanced osteoarthritis of the left knee and right knee pain following a total arthroplasty. For the left knee, he identified the diagnosis as class 4 knee arthritis with a cartilage interval of zero using Table 16-3 on page 511, which yielded a default impairment of 50 percent. Dr. Moore applied a grade modifier of 3 for functional history due to appellant's use of a walker and brace and a grade modifier of 2 for physical examination findings of "mild loss of range of motion and moderate palpatory findings." He determined that a grade modifier for clinical studies was not applicable as the cartilage interval finding was used in identifying the diagnosis. Dr. Moore stated, "The grade modifiers adjust the grade to A, which according to Table 16-3 corresponds to [a] left lower extremity impairment of 50 percent."

For the right knee, Dr. Moore used the diagnosis of a class 3 total knee replacement set forth in Table 16-3 of the knee regional grid, for a default value of 37 percent. He applied a grade modifier of 2 for functional history based on appellant's limp and use of a gait aid, and a grade modifier of 2 for physical examination findings of a "moderate loss of range of motion and palpatory findings." Dr. Moore used a grade modifier of 1 for clinical studies based on the "satisfactory position of prosthetic knee components." After applying grade modifiers to the default value, he concluded that appellant had a total right lower extremity impairment of 31 percent.

On June 3, 2013 an OWCP medical adviser reviewed Dr. Moore's report and noted that his findings duplicated that of his August 5, 2010 report. He related that based on Dr. Moore's impairment rating there was no basis for an increased schedule award.

By decision dated June 10, 2013, OWCP found that appellant had no more than the previously awarded 50 percent impairment of the left lower extremity and 37 percent impairment of the right lower extremity.

On appeal appellant indicates that Dr. Rustin found that she was totally and permanently disabled and that she had written OWCP requesting information about obtaining compensation. She asserted that OWCP failed to rate her right ankle impairment and requested a final decision on that issue. Appellant requests that the Board decide whether she is entitled to compensation for total disability and whether she is entitled to a schedule award for the right ankle.

LEGAL PRECEDENT

The schedule award provision of FECA,⁵ and its implementing federal regulations,⁶ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁷ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.⁸

The sixth edition requires identifying the impairment class for the diagnosed condition (CDX), which is then adjusted by grade modifiers based on Functional History (GMFH), Physical Examination (GMPE) and Clinical Studies (GMCS).⁹ The net adjustment formula is (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX).

ANALYSIS

OWCP accepted that appellant sustained left knee sprain, a tear of the left posterior horn meniscus, a left medial meniscal tear, localized primary osteoarthritis of the left knee and right knee arthropathy due to a December 3, 1992 employment injury. It referred her to Dr. Moore to determine the extent of any impairment of the knees. In a report dated August 5, 2010, Dr. Moore diagnosed advanced osteoarthritis of the left knee and status post right total knee replacement. He interpreted x-rays of the left knee as showing the “complete loss of medial joint cartilage space.” Dr. Moore found that appellant had 31 percent right knee impairment and a 50 percent left knee impairment. In a decision dated March 17, 2011, OWCP granted her a schedule award for a 50 percent left lower extremity impairment and a 31 percent right lower extremity impairment; however, on June 27, 2011 an OWCP hearing representative set aside the March 17, 2011 schedule award determination. Appellant determined that Dr. Moore had not sufficiently explained his grade modifiers and further found that the case required further development regarding whether she sustained a right lower extremity condition causally related

⁵ 5 U.S.C. § 8107.

⁶ 20 C.F.R. § 10.404.

⁷ *Id.* at § 10.404(a).

⁸ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

⁹ A.M.A., *Guides* 494-531.

to her accepted work injury. Based on the opinion of Dr. Rustin, an OWCP referral physician, it accepted right knee arthropathy as a consequential injury.

In an impairment evaluation dated May 23, 2013, Dr. Moore diagnosed a right knee total arthroplasty and advanced left knee osteoarthritis. For the left knee, he identified the diagnosis of class 4 knee arthritis based on x-ray evidence showing no cartilage interval using Table 16-3 of the A.M.A., *Guides*, which yielded a default value of 50 percent. Dr. Moore found a grade modifier of 3 for functional history based on appellant's use of a walker, a grade modifier of 2 for physical findings of loss of range of motion and that a grade modifier for clinical studies was not applicable as it was used to identify the diagnosis. He utilized the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or $(3-4) + (2-4) = -3$, which yielded an adjustment impairment rating of 50 percent for the left lower extremity.

For the right knee, Dr. Moore identified the diagnosis as a class 3 total knee replacement using the knee regional grid at Table 16-3, which provided a default impairment of 37 percent. He found a grade modifier of 2 for functional history based on appellant's use of a gait aid, a grade modifier of 2 for physical examination due to loss of motion and a grade modifier of 1 for clinical studies showing a satisfactory result. Using the net adjustment formula, (GMFH-CDX) + (GMPE-CDX) + (GMCS-CDX), or $(2-3) + (2-3) + (1-3) = -4$, for an adjustment impairment rating of 37 percent of the right lower extremity. An OWCP medical adviser reviewed Dr. Moore's report and concurred with his finding. Appellant has submitted no evidence showing that she has more than a 50 percent left lower extremity impairment and a 31 percent right lower extremity impairment.

On appeal appellant asserts that Dr. Rustin's opinion established that she is totally disabled and requests compensation for disability. Disability for work under section 8105 of FECA is not a factor included in a schedule award impairment rating under section 8107. A schedule award is not intended to be compensation for wage loss or potential wage loss and is made without regard to whether or not there is a loss of wage-earning capacity resulting from the injury or its effects upon employment or social opportunities.¹⁰ Further, the Board's jurisdiction is limited to reviewing final adverse decisions of OWCP issued under FECA.¹¹ OWCP has not issued a final decision regarding any claim for compensation for total disability. Thus, it is not before the Board at this time.

Appellant also argues that she is entitled to a schedule award for her ankle condition based on Dr. Rustin's opinion. OWCP, however, has not accepted that she sustained an ankle injury as a consequence of her December 3, 1992 work injury. Further, as there is no final decision on this issue, the Board has no jurisdiction over this matter.¹²

¹⁰ *Renee M. Straubinger*, 51 ECAB 667 (2000).

¹¹ 20 C.F.R. § 501.2(c).

¹² *Id.*

Appellant may request a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has no more than a 50 percent left lower extremity impairment and a 31 percent right lower extremity impairment, for which she received schedule awards.

ORDER

IT IS HEREBY ORDERED THAT the June 10, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: February 11, 2014
Washington, DC

Richard J. Daschbach, Chief Judge
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board